

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JIMMY S. DAVIS, JR.**  
Claimant

VS.

**PKM STEEL SERVICES, INC.**  
Respondent

AND

**MIDWEST BUILDERS CASUALTY  
MUTUAL COMPANY**  
Insurance Carrier

Docket No. 1,059,198

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the April 11, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Mitchell W. Rice, of Hutchinson, Kansas, appeared for claimant. James E. Kelley, Jr., of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ granted respondent's request to be relieved of any obligation to provide claimant with medical treatment or monetary benefits, finding the record failed to demonstrate the November 21, 2011, accident was the prevailing factor in causing claimant's injury, disability or need for treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 12, 2013, Preliminary Hearing and the exhibits, and the deposition of Vito J. Carabetta, M.D., taken January 17, 2013, and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant asks the Board to review whether the ALJ erred in finding claimant failed to sustain his burden of proof. Claimant did not file a brief in this appeal.

Respondent asserts that claimant's appeal should be dismissed because he failed to file a brief in this appeal. In the alternative, respondent asks the Board to affirm the ALJ's Order.

The Board is unable to dismiss this appeal simply due to claimant's failure to file a brief. Because claimant's Application for Review by the Workers' Compensation Board is ambiguous, the Board has reviewed the ALJ's Order and concludes the only ruling over which it has jurisdiction is the ALJ's finding that the "record compiled to date fails to demonstrate that the November 21, 2011 accident, which is the subject of the present claim, is the prevailing factor in causing Claimant's injury, disability or need for treatment."<sup>1</sup>

#### **FINDINGS OF FACT**

Claimant began working for respondent as a temporary employee through Team Employment. He was made an employee of respondent on November 18, 2011. On November 21, 2011, claimant tripped at work, causing him to fall and land on his back. He filed an accident report on November 23, 2011, in which he stated he tripped over a 4 x 4 while "doing my job and limping all day doing it."<sup>2</sup> Claimant described his injury as: "[I] was in pain all day due to what I thought was a pulled muscle from [work] before."<sup>3</sup> Claimant would not testify at the preliminary hearing, however, that the pain he felt on November 21 was due to a previous work accident on November 15, 2011.

Claimant had sustained the November 15, 2011, injury while working for respondent as a temporary employee. He filed an accident report on November 23, 2011, in which he described his injury of November 15 as "right hip very sore tingling going down back of leg to bottom of right foot, across the top of right foot tingling" after moving a load of steel.<sup>4</sup> Claimant testified at the March 12, 2013, preliminary hearing that on November 15, 2011, he simply pulled a muscle. He testified his level of pain after the November 15, 2011, injury was a two or three but that because of his arthritis, his back pain is normally at levels one, two or three. Claimant did not seek any medical treatment and continued to work the rest of the week. He suffered his second injury the next Monday, November 21.

Claimant filed two workers compensation claims. The claim for the accident of November 15, 2011, was against Employer Solutions Group 3/Team Employment, Docket

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<sup>1</sup> ALJ Order (Apr. 11, 2013) at 1.

<sup>2</sup> Claimant confirmed in his preliminary hearing testimony that he had been limping before the accident on November 21, 2011.

<sup>3</sup> P.H. Trans., Resp. Ex. B.

<sup>4</sup> P.H. Trans., Resp. Ex. A.

No. 1,059,197. The claim for the accident of November 21, 2011, was against PKM Steel Services, Inc.

Claimant's discovery deposition was taken in both claimant's workers compensation claims on March 23, 2012. Claimant testified in his deposition that as a result of his first accident on November 15, he was claiming injuries to the right side on the bottom of his back at the L4-5 level, numbness in the right leg, weight loss in the right leg, and his right foot is totally asleep. Claimant said after the November 15 accident, he was in severe pain, which he described as a 9 on a scale of 1 to 10. Claimant said he pretty much injured the same body parts in his second accident, on November 21. The only differences, he said, were that his back pain after November 21 started higher on his back, more towards the middle of his back, than did the back pain he felt after the November 15 accident, and that the second injury affected his right knee.

The claim against Employer Solutions, resulting from claimant's November 15, 2011, accident was settled by agreement of the parties on May 9, 2012. No medical or temporary total disability benefits had been paid, and the settlement was a strict settlement of the case for \$20,000, with claimant giving up all rights under the workers compensation act, including review and modification and future medical.

At the preliminary hearing on March 12, 2013, claimant testified that on November 15, 2011, he injured his low back at the L4-5 level and that after the injury he felt numbness and tingling in his two biggest toes on the right. He denied his right foot was asleep before the November 21, 2011, accident. Claimant denied injuring the middle portion of his back in the November 21, 2011, accident but stated it was his low back that was injured. Claimant also testified the pain in his low back after the November 15 accident was a 2 or 3, not a 9 as he had previously testified. Claimant claimed he confused the dates when testifying at his discovery deposition.

Claimant was evaluated by Dr. Vito Carabetta on October 1, 2012, at the request of the ALJ. Dr. Carabetta's report indicates that claimant was injured on November 21, 2011, when he tripped over a beam and tumbled forward. Claimant testified he told Dr. Carabetta about the November 15 accident, but there is no mention in the report of the previous incident and Dr. Carabetta testified in his deposition that claimant did not tell him about a November 15, 2011, accident. The report indicated claimant said he had been asymptomatic before his November 21, 2011, accident. Based on that information, Dr. Carabetta opined in his report of October 1, 2012, that the prevailing factor in this case was claimant's injury at work on November 21, 2011.

During Dr. Carabetta's deposition, which was taken January 17, 2013, he was given a copy of a portion of claimant's discovery deposition testimony on March 23, 2012. After reviewing that testimony, Dr. Carabetta agreed that the history of injury claimant provided to him was inaccurate and that the complaints claimant made at the time of his examination were the same complaints claimant, in his discovery deposition, had related

to the November 15, 2011, accident. Dr. Carabetta then stated it was his opinion that the prevailing factor in causing claimant's disc pathology was the injury of November 15, 2011. When claimant's attorney read testimony from a July 27, 2012, deposition in which claimant related his problems to the second accident, November 21, 2011, Dr. Carabetta stated, "Frankly with what I'm hearing today, none of his testimony is believable because he changes it to fit the questions that are being put before him."<sup>5</sup>

Claimant was evaluated by Dr. B. Theo Mellion on January 17, 2013. Claimant reported to Dr. Mellion that he was in his usual state of health until his accident of November 21, 2011, when he fell head over heels at work. "At that time, he had the sudden onset of severe pain in his lower back and some tingling radiating into the left leg."<sup>6</sup> Claimant told Dr. Mellion that on November 15, he had turned and twisted his back at work and had some mild discomfort in his back, but that the severe pain did not start until November 21. Dr. Mellion concluded:

Given the time course of his symptoms in relation to the fall at work and the fact that he tells me he was asymptomatic prior to this injury, it is within a reasonable degree of medical certainty that his work-related accident on November 21, 2011 is the prevailing factor in the current symptoms for which he is seeking treatment.<sup>7</sup>

The ALJ found that claimant had no credibility and granted respondent's request to be relieved of any obligation to provide claimant with medical treatment or monetary benefits. The ALJ based his decision on claimant's failure to demonstrate that the November 21, 2011, accident was the prevailing factor in claimant's injury, disability or need for medical treatment.

#### **PRINCIPLES OF LAW**

K.S.A. 2011 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the

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<sup>5</sup> Carabetta Depo. at 32.

<sup>6</sup> P.H. Trans., Cl. Ex. 1 at 1.

<sup>7</sup> *Id.*

claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>8</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>9</sup>

### ANALYSIS

Claimant settled his claim for a November 15, 2011, injury on May 9, 2012. The settlement hearing included a report from Dr. Reiff Brown, which stated, "this man has an acute lumbar radiculopathy on the right most likely caused from herniation at L4-L5 or L5-S1."<sup>10</sup> Now claimant comes before this Board asking for benefits allegedly arising from an accident which occurred less than one week later, on November 21, 2011. Claimant is

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<sup>8</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>9</sup> K.S.A. 2011 Supp. 44-555c(k).

<sup>10</sup> P.H. Trans., Resp. Ex. D at 20.

asking for medical treatment related to the same condition for which he settled the prior claim, a disc herniation at L4-5. Treatment recommendations, including surgery, were made by Dr. Mellion.

Dr. Mellion reports that claimant's severe back pain and leg pain did not start until November 21, 2011. That is puzzling, since claimant settled a claim for the same symptoms arising, allegedly, from an accident that occurred a week prior. It is clear to this Board member that claimant downplayed the prior accident to Dr. Mellion in an attempt to manipulate his opinion. It is also significant that claimant failed to mention the previous accident to Dr. Carabetta.

The undersigned agrees with the ALJ that claimant has failed to sustain the burden of proving by a preponderance of the evidence that the November 21, 2011, accident is the prevailing cause of his need for treatment. According to Dr. Brown, the same disc herniation at L4-5 was related to the November 15, 2011 accident. Dr. Mellion's opinion is given no weight, as it apparent that he did not have an accurate medical history.

The ALJ was clear in his order that he did not find claimant to be a credible witness. That opinion is supported by claimant's apparent attempts to manipulate the medical opinions of Dr. Carabetta and Dr. Mellion. In weighing the conflicting testimony and determining the respective credibility of the witnesses, the Board takes into consideration that the ALJ had the opportunity to personally observe the testimony. In this respect, the ALJ had the unique opportunity to observe claimant's demeanor and assess his credibility. Therefore, the Board gives some deference to the findings and conclusions of the ALJ in this regard.

### **CONCLUSION**

Based upon the foregoing, the undersigned finds that the claimant has failed to prove that his alleged accidental injury on November 21, 2011, was the prevailing cause of his need for medical treatment or any other benefit.

### **ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated April 11, 2013, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2013.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge